ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Slingsby Aviation Limited	)	ASBCA No. 50473
	)	
Under Contract No. F33657-91-C-0004	)	

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OPINION BY ADMINISTRATIVE JUDGE MOED

Appellant, Slingsby Aviation Limited (SAL), located in Kirkbymoorside, North Yorkshire, England (hereinafter KMS), produced and delivered 113 T-3A Enhanced Flight Screener (EFS) aircraft under this firm, fixed-price contract awarded by the Department of the Air Force. During the contract, SAL took the actions required by the Federal Aviation Administration (FAA) to upgrade its intended quality assurance program in order to qualify its subcontractor's aircraft assembly facility at Hondo, TX for a production certificate. SAL seeks to recover the added costs incurred for that upgrade on the ground that there was no contract requirement to obtain a production certificate. The contracting officer disagreed with that interpretation and denied the claim resulting in the present appeal. At this juncture, only entitlement is to be decided.

As used herein, "Federal Aviation Regulations" (FAvR) refers to Title 14, Code of Federal Regulations (C.F.R.), Chapter 1, subchapter C, Parts 21 and 23 as of 1 January 1992. FAvR provisions are referred to herein using a combination of part and section numbers, *e.g.*, FAvR 21.1.

FINDINGS OF FACT

Solicitation and Contract Award

1. On 20 September 1991, the Aeronautical Systems Division (ASD) of the U.S. Air Force Systems Command (AFSC) issued a solicitation requesting proposals for supply of approximately 125 EFS aircraft (also designated as T-3A aircraft) and for post-delivery contractor logistic support (CLS) of the aircraft (R4, tab 112). The acquisition element of the solicitation is hereinafter referred to as the EFS RFP.

2. The present contract, resulting from competitive negotiations under the EFS RFP, was awarded to SAL on 29 April 1992 at the firm, fixed price of $11,735,745. The contract was for supply of 38 EFS T-3A aircraft (Lot I) and associated technical data and pilot training (R4, tab 1 (hereinafter "contract")). The Government exercised options to purchase 75 additional aircraft (Lots II and III) resulting in a total of 113 aircraft acquired under the contract. A separate contract, No. F34601-92-C-0001, was awarded to SAL on 27 April 1992 for CLS of the delivered EFS aircraft.

3. The aircraft to be supplied was described in Section B (Supplies or Services and Prices/Costs) of the contract as "an airworthy EFS commercial FAA Acrobatic type certificated aircraft . . . in accordance with Attachment 1 to Section J, Statement of Work (SOW) and Attachment 2 to Section J, System Specification" (contract at 2 of 42). The System Specification and the Statement of Work (SOW) are identified in Section C of the contract schedule as the "description/specifications" (contract at 19 of 42).

EFS Mission and Acquisition Concept

4. The mission of the EFS aircraft was to provide basic flight training and experience to U.S. Air Force (USAF) pilot candidates sufficient for a determination of suitability for further training as bomber-fighter or tanker-transport pilots. That mission required a fully acrobatic aircraft capable of flying in formation, executing overhead traffic patterns, and performing other maneuvers. (Ex. A-16 at 4; R4, tab 112 at attach. 2 to Section L). USAF determined that these requirements could be satisfied with a "commercial off-the-shelf" aircraft "that [was] generally available to the public" which would not require "the normal government development" effort (tr. 13/248).

Type Certification

5. Instructions to Offerors (ITO) § 2.10 of the EFS RFP required that, prior to contract award, the successful offeror's "unmissionized aircraft" (*i.e.*, the aircraft without the modifications needed in order to comply with EFS RFP requirements) be "FAA type-certified in accordance with [FAvR] Part 23, Acrobatic Category, or an equivalent foreign civil certification" (R4, tab 112 at 220).

6. SAL's unmissionized aircraft was its T67 Firefly aircraft. This was a two-seater, side-by-side acrobatic trainer. Approximately 80 of these aircraft were in service, world-wide, as of the submission of SAL's proposal. The T67 aircraft qualified under ITO § 2.10 (finding 5) in that three variants (T67A, T67M, and T67C) had been type certificated to the standards of FAvR Part 23 by the United Kingdom (U.K.) Civil Aviation Authority (CAA) prior to the issuance of the EFS RFP. The CAA type certificate had been granted pursuant to the British Civil Airworthiness Requirements (BCAR) (proposal, tab I at 11). The BCAR, promulgated pursuant to the U.K. Civil Aviation Act (1982) (ex. B-2 at 2), contains procedures and technical requirements relating to issuance of type certificates and certificates of airworthiness (C of A's) by the CAA (tr. 6/23).

7. FAA type certification of the missionized aircraft was an element of the contract line item description of the aircraft. In Section B (Supplies or Services and Prices/Costs) of the contract schedule, the aircraft to be supplied was described as "an airworthy EFS commercial FAA Acrobatic type certificated aircraft" (contract at 2 of 42). Section 3010 (EFS Aircraft) of the SOW required SAL to "obtain [FAvR] Part 23 Acrobatic Category type certification for the complete aircraft, including any modifications necessary to meet requirements of the approved specifications" (contract, Attach. 1, at 2).

8. SAL complied with SOW § 3010 by obtaining FAA Type Certificate (Import) No. A73EU, dated 16 December 1993 (ex. A-199) for the missionized aircraft. The type certificate states that the bases of certification were [FAvR] 21.29 and [FAvR] Part 23. The reference to FAvR 21.29 (Issue of type certificate: import products) reflects the fact that the FAA type certificate was issued on the basis of a type certificate for these aircraft previously issued by the CAA.[1] FAvR Part 23 "prescribes airworthiness standards for the

[1] FAvR 21.29 implements an agreement, dated and effective 28 December 1972, between the governments of the United States and the United Kingdom, and similar agreements with other governments, relating to C of A's for imported aircraft, TIAS 7537, 23 U.S.T. 4309 (ex. A-1) (hereinafter the U.S./U.K. Airworthiness Agreement). FAvR 21.29 provides, in part, that:

> (a) A type certificate may be issued for a product that is manufactured in a foreign country with which the United States has an agreement for the acceptance of these products for

issue of type certificates . . . for airplanes in the normal, utility, acrobatic, and commuter categories" (FAvR 23.1(a)).

9. Type certificates are issued for aircraft, aircraft engines, and propellers (FAvR 21.17). The conditions for issuance of an FAA type certificate under FAvR Part 23 are set forth in FAvR Part 21 which provides, in part, as follows:

> An applicant is entitled to a type certificate for an aircraft in the . . . acrobatic . . . category . . . if –
>
> . . . .
>
> (b) The applicant submits the type design, test reports, and computations necessary to show that the product to be

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> export and import and that is to be imported into the United States if - -
>
> (1) The country in which the product was manufactured certified that the product has been examined, tested, and found to meet - -
>
> . . . .
>
> (ii) The applicable airworthiness requirements of this subchapter . . . or the applicable airworthiness requirements of the country in which the product was manufactured and any other requirements the Administrator may prescribe to provide a level of safety equivalent to that provided by the applicable airworthiness requirements of this subchapter . . . ;
>
> (2) The applicant has submitted the technical data, concerning . . . airworthiness, respecting the product required by the Administrator . . . .
>
> . . . .
>
> (b) A product type certificated under this section is considered to be type certificated under the . . . airworthiness standards of that part of the [FAvR] with which compliance is certified . . . or to which an equivalent level of safety is certified . . . .

> certificated meets the applicable airworthiness . . . requirements of the [FAvR] . . . and the [FAA] finds –
>
> (1) Upon examination of the type design, and after completing all tests and inspections, that the type design and the product . . . meet the applicable airworthiness requirements of the [FAvR] . . . and
>
> (2) For any aircraft, that no feature or characteristic makes it unsafe for the category in which certification is requested.

10. Clause H-012 FEDERAL AVIATION ADMINISTRATION REQUIREMENTS required the following:

> The Contractor must provide to the Government a Federal Aviation Administration Conformity Certificate - Military Aircraft FAA Form 8130-2 prior to the delivery and acceptance by the Air Force of each aircraft.

(Contract at 28 of 42) FAA Form 8130-2 (ex. A-235) recites, in part, that:

> This certifies that the aircraft described below has been manufactured in conformity with data forming the basis for Type Certificate No. [insert], and any revision or modification thereof approved by the FEDERAL AVIATION ADMINISTRATION as of (Date) with the exception of the following deviations [listed].

FAA Form 8130-2 contains a space for insertion of the date of completion of "FAA Ground Inspection and Flight Test" and the approval signature of an FAA representative. (Ex. A-225 at 1)

Certificates of Airworthiness

11. On 13-16 October 1992, the parties held a programming conference at KMS in order to make necessary adjustments to the performance schedule for the effects of a work stoppage attributable to a protest against award of the contract (ex. A-64). A post-award conference was held immediately thereafter on 27-30 October 1992 (ex. A-79). During one of these conferences, LT COL Michael Uecker, USAF, the prospective program manager of the EFS System Program Office (EFS SPO) and Mr. Charles C. Compton (then Captain, USAF), the lead engineer in the EFS SPO, stated that the USAF Air Education and Training Command (AETC), the prospective operator of the T-3A aircraft, desired that

individual FAA C of A's be obtained for these aircraft (tr. 6/153). The EFS RFP and the awarded contract did not expressly require, or even make mention of, C of A's.

12. The FAA is authorized by statute to issue a C of A to the registered owner of an individual aircraft upon a finding by the FAA that "the aircraft conforms to the type certificate therefor, and after inspection, that the aircraft is in condition for safe operation." 49 U.S.C. app. § 1423(c) (1992). FAvR 21.183 provides several alternate bases for issuance of C of A's for aircraft which meet the above statutory requirements. Three of these are pertinent here, namely, C of A's based on manufacture of aircraft under a production certificate; C of A's based on manufacture of an aircraft under a type certificate; and C of A's based on qualification as an import aircraft.

13. SAL believed that LT COL Uecker's statement that C of A's were desired by AETC was tantamount to a direction to SAL to obtain the same (tr. 3/147). In a letter, dated 8 December 1993, addressed to the incumbent EFS SPO contracting officer, Mr. Cornelius Will, SAL asserted that it was not obligated under the contract to obtain C of A's for the aircraft. It was willing to perform that task if the contract were modified accordingly. However, such a modification would have "monetary and [program] implications" inasmuch as "[its] scheduling and costings did not include provision for this activity." (Ex. A-197) This matter was raised with the USAF at a meeting held on 22 June 1995 which had been convened for discussion of a different matter. Prior to the meeting, however, SAL had informed Mr. Will that it wished to make a presentation, also, on the matter of its obligation to furnish C of A's. At the meeting, when it asked for permission to make that presentation, Mr. Will responded that "we will listen but we won't discuss it." (Tr. 6/277-80)

14. The substance of SAL's presentation was that the contract did not require SAL to furnish the C of A's (tr. 6/284). During the presentation, reference was made to SAL's letter to the contracting officer, dated 8 December 1993. Mr. Will stated that he was not aware of that letter and had not received the same. He was then given a copy thereof (tr. 6/286). In fact, the letter had been transmitted to the contracting officer, by FAX on 8 December 1993 and received in the EFS SPO on the same day (ex. A-197). Apparently, as the result of misdirection and misfiling, the letter was not promptly delivered to the contracting officer. It was discovered and delivered to the contracting officer some time after 31 July 1995. (Tr. 13/32) SAL was not informed of the Government's position on this matter until issuance of the contracting officer's written decision, dated 9 January 1997 (R4, tab 11), which led to this appeal. That decision was issued after delivery of all of the aircraft (finding 50). In that decision, the contracting officer agreed that the contract did not require SAL to obtain C of A's for the aircraft but denied that SAL had been directed to obtain the C of A's. On that basis, the monetary claim was denied. Aircraft Nos. 1 and 2 were delivered on 3 February 1994 with C of A's issued by CAA (finding 15). Aircraft Nos. 3 through 113 were delivered with C of A's issued by the FAA (tr. 5/224).

SAL's Proposal for Production of the Aircraft

15. Aircraft Nos. 1 and 2 under this contract were built at KMS. They were inspected and tested by CAA, following which the aircraft were issued with CAA Export C of A's. The aircraft were then disassembled, crated, and shipped to the United States for re-assembly by SAL's subcontractor, Northrop Worldwide Aircraft Services, Inc. (NWASI) at a new facility established at Hondo, Texas. The re-assembly was performed under the surveillance of a CAA inspector. In December, 1993, the completed aircraft were inspected by CAA and found to conform to the CAA type certificate for that model (T67M260-T-3A). These actions were in conformity with the proposal submitted by SAL in response to the EFS RFP (proposal at 2-98; ex. A-48; tr. 1/152-53).

16. Under the DFARS 252.225-7001 BUY AMERICAN ACT AND BALANCE OF PAYMENTS PROGRAM (JAN 1991) clause of the EFS RFP and the contract, SAL could have supplied aircraft manufactured exclusively in the U.K. DFARS 225.7403 lists the U.K. as among the qualifying countries for the purposes of that clause. SAL decided, however, to produce all but the first two aircraft in the U.S. That decision was taken because SAL's production facility at KMS did not have the capacity to deliver five aircraft per month as would be required under the schedules in the solicitation. In addition, wage rates for production of the aircraft in the United States were expected to be lower than those paid at KMS, allowing SAL to propose a lower price for the aircraft. (Tr. 2/50-51, 5/18; proposal, attach. D at 6)

17. The manufacture of the third and subsequent aircraft would be divided between SAL and NWASI. SAL would manufacture the composite material components, such as the fuselage (including the engine mounting structure, engine cowls, and canopy), wings, rudder, elevator, ailerons, and flaps and tailplane assembly - work as to which it had gained considerable experience and expertise - and ship these to NWASI. (Tr. 2/50-51, 5/18; proposal, attach. D at 6). NWASI would acquire the remaining components (*i.e.*, engine, avionics, forward and main undercarriages, instrument panel assembly, propeller, and seats) and assemble these with the pieces manufactured by SAL into complete aircraft which would be inspected, tested, and delivered to the Air Force (proposal, attach. D, Figure D-6).

Requirement for FAA Production Certificate

18. On 7-11 December 1992, subsequent to the post-award conference (finding 11), the EFS SPO convened a Systems Requirements Review (SRR) with SAL. The SRR, which was attended also by the contracting officer (tr. 12/187), generated several action items among which was Action Item #31, assigned to SAL, directing the preparation of:

> [S]chedules for activation of [NWASI's] certification for aircraft requirements. The schedule is to include [NWASI's]

> plans/activities required to obtain production certificate for manufacturing the aircraft after aircraft certification.

(Ex. A-87) A production certificate would relate to Aircraft Nos. 3 - 113 which were planned for assembly in the United States (tr. 11/199-202).

19. Production certificates are issued by FAA pursuant to FAvR Part 21, Subpart G. The applicant must be the holder or licensee of a type certificate for a product which can be either an aircraft, aircraft engine, or propeller. The holder of a production certificate is entitled to issuance of a C of A for aircraft produced under the certificate "without further showing" except that the FAA "may inspect the aircraft for conformity with the type design." (FAvR 21.133(a), 21.135, 21.163(a)).

20. FAvR 21.135 states that "[a]n applicant is entitled to a production certificate if the [FAA] finds, after examination of the supporting data and after inspection of the organization and production facilities, that the applicant has complied with [FAvR] 21.139 [and] 21.143." FAvR 21.139 requires the applicant to "show that [it] has established and can maintain a quality control system" for the product "so that each article will meet the design provisions of the pertinent type certificate."

21. FAvR 21.143 requires an applicant to submit, for approval, "inspection and test procedures necessary to ensure that each article produced conforms to the type design and is in a condition for safe operation." The contents of that submittal, as listed in FAvR 21.143(b), include: responsibility and authority of the quality control organization; inspection procedures for raw materials and purchased materials; methods used in production inspection of parts and assemblies; materials review system; system for keeping inspectors informed of changes in drawings, specifications, and quality control procedures; locations and type of inspection stations. Issuance of the production certificate is preceded by the FAA's "examination of the supporting data and after inspection of the organization and production facilities."

22. Neither the EFS RFP nor the awarded contract expressly required the contractor to obtain a production certificate. In ITO § 2.16.4, offerors were asked as supporting data to describe their "status (or planning) with regard to FAA production certification of the facility intended for this program" (R4, tab 112 at 223; *see* finding 36). SAL's proposal did not contain that description.

23. On 28 February 1992, following receipt of proposals, the contracting officer held discussions with SAL prior to requesting its best and final offer (hereinafter "pre-BAFO discussions"). Among the attendees at the pre-BAFO discussions was Mr. Herman Belderok, an employee of FAA who had served as an advisor to the EFS source selection panel. Mr. Belderok stated, as to the third and later aircraft to be assembled in the United States, that "it would be necessary for the FAA to give a Production Certificate

which would involve the [a]pproval of [NWASI's] manufacturing facilities" (ex. A-63 at 11). This was followed by a statement by Mr. Peter G. Pollock, an executive of ML Holdings, Ltd., which was SAL's parent company, that SAL "would be pursuing an FAA type certificate and an FAA production certificate" (tr. 9/267). SAL did not include any amount in its price proposal for obtaining a production certificate or FAA C of A's (tr. 2/225-26). That decision was based on SAL's interpretation of the EFS RFP as requiring only type certification of the aircraft (tr. 2/324).

24. Ms. Barbara Liptak had been designated by the contracting officer to serve as the Government's lead negotiator at the pre-BAFO discussions. She testified that following Mr. Pollock's statement, she "undertook an examination of contractual language to ensure that what [she] had heard in the discussion was reflected in the contractual documents" (tr. 9/308). She stated that she reviewed System Specification § 3.2.3.2 with Mr. Simon Cooper, SAL's contract director (tr. 9/306, 308; *see* finding 26), following which she told Mr. Cooper that the Government "felt that [§ 3.2.3.2] adequately represented Mr. Pollock's statement that [an] FAA production certificate would be provided" (tr. 9/306). According to Ms. Liptak, Mr. Cooper responded by saying that "it looks like that's got it covered" (tr. 9/308). Mr. Cooper had prepared minutes of the pre-BAFO discussions (ex. A-63). At the hearing, he was unable to recall any discussion as to a production certificate "beyond what [was] written" in those minutes which reported only Mr. Belderok's statement (tr. 3/66-68; ex. A-63).

25. Ms. Liptak stated that her testimony as to the discussion with Mr. Cooper was the product of a recollection which occurred approximately two weeks before the hearing (tr. 10/115-16). Ms. Liptak had been deposed by appellant prior to the hearing. At that time, she could not recall any conversation with Mr. Cooper at the pre-BAFO discussions. There is no evidence as to what prompted her more recent recollection. The record also contains an internal memorandum, dated 29 February 1992, prepared by Ms. Liptak, which was stated to "represent a record" of the pre-BAFO discussions. The memorandum says nothing about a production certificate (R4, tab 113 at 101). Ms. Liptak's testimony is the only evidence of an agreed interpretation of System Specification § 3.2.3.2. In the light of the foregoing circumstances, that testimony does not have sufficient weight to permit finding, as fact, that such agreement was made.

26. System Specification § 3.2.3.2, which is a subsection of § 3.2.3 (Physical Characteristics) is as follows:

> 3.2.3.2 AIRFRAME. The basic airframe shall be constructed in accordance with the current FAA or equivalent type and production certification and shall retain Type certification after incorporation of all modifications.

(System Specification at 5)

27. Section 3.2.3.2 was drafted by the Government and included in the EFS RFP as § 3.2.3.2 of the Systems Requirement Document (SRD) attachment (R4, tab 112 at 352). It was thereafter carried over, verbatim, into the System Specification of the awarded contract. Section 3.2.3.2 is located within § 3.2.3 titled "Physical Characteristics." It is preceded by § 3.2.3.1 ("Mass Properties") which includes § 3.2.3.1.2 ("Basic Weight") and § 3.2.3.1.3 ("Operating Weight"). Section 3.2.3.2 contains § 3.2.3.2.1 ("Visibility"), § 3.2.3.2.2 ("Landing Gear"); § 3.2.3.2.3 ("Dimensions"), and § 3.2.3.2.4 ("Airframe Service Life"). (System Specification at 4-5)

28. The contracting officer's letter of 14 February 1992, containing instructions to SAL as to the forthcoming pre-BAFO discussions, stated that "[a]ll terms and conditions and proposal changes will be negotiated and documented during this discussion session" (ex. A-30). Mr. Pollock's statement that SAL would obtain a production certificate was not documented at, or after, the pre-BAFO discussions (R4, tab 114).

29. SAL's BAFO was submitted on 27 March 1992. The covering letter states that "[t]he management decisions and other changes made in the BAFO are fully explained" (R4, tab 114 at 1). The BAFO did not undertake to obtain a production certificate. There is no mention thereof in the BAFO.

Obtaining the Production Certificate

30. After issuance of Action Item #31 (finding 18), SAL took the position that the production certificate was not required by the contract (tr. 6/231-32). That position was made known to LT COL Uecker on or about 27 January 1993 (ex. A-97). LT COL Uecker responded that he wanted SAL to proceed with efforts to obtain the production certificate (tr. 6/233-34). In a message to SAL, dated 9 March 1993, he asked for a "detailed summary of how we are doing on the . . . production certificates" and noted that there was a need for a "clear picture of all that is required for production certification" (ex. A-105). On or about 16 March 1993, NWASI began taking the steps necessary to obtain a production certificate. It was decided that NWASI, rather than SAL, should be the applicant and holder of, the production certificate.

31. Representing FAA at the meetings with SAL and NWASI were Messrs. William A. Daniel and Mr. Ray Robinson, respectively the manager of FAA's Manufacturing Inspection District Office No. 43, located in San Antonio, Texas (MIDO), and an FAA Aviation Safety Inspector at MIDO (tr. 11/34). MIDO was responsible for issuance of C of A's and production certificates for aircraft manufactured, and facilities located, in the geographical area which included NWASI's planned facility at Hondo, Texas (tr. 1/150-52). During one of these meetings, Mr. Daniel told NWASI that C of A's could be issued only for aircraft which (1) had been manufactured under a production certificate or (2) which had

been manufactured entirely in the U.K. and qualified for C of A's under FAvR 21.183(c) relating to import aircraft (tr. 11/199-202).[2]

32. SAL made a request to MIDO to be excused from securing a production certificate for the reason that this was a relatively small, short-term production program. SAL proposed that, in lieu of a production certificate, manufacture of the aircraft be inspected and approved directly by MIDO. SAL's request was denied on the ground that MIDO was not staffed for direct inspection of the entire quantity of aircraft to be manufactured at Hondo. MIDO agreed, however, to perform direct inspection for up to six months while NWASI was pursuing the application for a production certificate. (Tr. 11/119-21; ex. A-269).

33. By letter of 8 June 1994 (ex. A-263), NWASI asked MIDO to extend the duration of FAA direct inspection which was due to expire on 19 June 1994. Among the reasons given for extension was that SAL "is accustomed to CAA rules and standards that enable them to manage certain design documentation and production processes in ways unacceptable to the FAA." For this and other stated reasons, NWASI "has not completed implementation of its quality control system to a satisfactory degree." (Ex. A-263)

34. On 29 June 1994, FAA granted an extension of direct inspection until 19 December 1994 (ex. A-269). All of the actions needed in order to qualify NWASI for a production certificate were completed prior to the expiration of that extension. The production certificate was issued to NWASI on 15 September 1994. As of that date, 21 aircraft had been delivered to the Air Force with C of A's. (Tr. 8/243)

Quality Program Requirements

35. SOW § 3050.2.4 was as follows:

> Quality Assurance (QA). The contractor shall maintain a quality program which meets or exceeds the requirements of

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[2] As implementation of the U.S./U.K. Airworthiness Agreement and similar agreements between the United States and other governments, FAvR 21.183(c) provides for issuance of C of A's for import aircraft as follows:

> (c) *Import aircraft.* An applicant for a standard airworthiness certificate for an import aircraft certificated in accordance with § 21.29 [note 1] is entitled to an airworthiness certificate if the country in which the aircraft was manufactured certifies, and the [FAA] finds, that the aircraft conforms to the type design and is in condition for safe operation.

> [FAvR] Part 21 (or foreign equivalent). The contractor shall permit the procuring activity's representative to review the contractor's Federal Aviation Administration approved quality program (or equivalent), and to have access to all quality related records and data, including suppliers' activity.

(SOW at 11)

36. ITO § 2.16.4 of the EFS RFP requested the following:

> The offeror shall describe his quality assurance program and quality organizational structure, including the extent of his implementation of [FAvR] Part 21 (or foreign equivalent). As supporting data, the offeror shall describe his status (or planning) with regard to FAA production certification of the facility intended for this program.

(R4, tab 112 at 223)

37. The quality assurance program proposed by SAL in response to ITO § 2.16.4 was in two parts. The first, relating to production at KMS, was the program set forth in SAL's company exposition (ex. B-2 at 8; attach. to ex. B-2), supplemented by departmental manuals (for organizations such as the technical department, production planning, and manufacturing control) and the company procedures manual (proposal, 2-92, 93-95). The proposal stated that SAL's quality system also "meets all the requirements of [AQAP-1 (NATO Requirements for an Industrial Quality Control System, Ed. No. 3, May, 1984) (ex. Vol. 1A, tab B)] and is comparable to [U.S. Specification] MIL-Q-9858A [(Quality Program Requirements)]" (proposal 2-95).

38. The company exposition had been the basis for approval of SAL, by CAA, as an A1 Primary Company (BCAR A8-1, App. No. 1, ¶ 1.5). Under the BCAR, only "CAA Approved Organisations" are authorized to perform aeronautical work in the U.K. The authorization can be granted for individual activities, such as maintenance and overhaul. The Approved Organization with the broadest scope of authorized activity is the A1 Primary Company which is "approved for the design and manufacture of complete aircraft, engines, or controlled items of equipment, and the overhaul of [its] own product." (Ex. B-2 at 3-5; BCAR A8, Introductory Note)

39. SAL was first approved as an A1 Primary Company in November, 1984. The approval was periodically updated thereafter to reflect changes in the scope of covered activities (ex. A-329 at iv, v, vi). The approval in effect at the time of proposal submission, dated 22 July 1991, was for "design, manufacture, overhaul modification, and repair" of

listed "[u]npressurized piston engine aeroplanes [sic]" including "[a]ll variants of T67 aircraft" (exs. A-19A, -329 at viii).

40. The required contents of a company exposition include: policy and administration of the quality program, including the quality audit system; control of purchases from vendors, including quality control surveillance of subcontractors (BCAR A8-1, § 2.7.1 (a), (g)). The CAA certificate approving SAL as an A1 Primary Company states that SAL "shall . . . comply with the terms of the [company e]xposition submitted by [SAL] and approved by the [CAA]" (ex. A-19A at 2). As an A1 Primary Company, SAL was required to operate its quality assurance system "to the satisfaction of the CAA in respect of all products handled under the terms of CAA [a]pproval." The CAA is entitled to "revoke, suspend or vary the terms of [a]pproval if the conditions required for approval are not maintained." (BCAR A8-1, ¶¶ 3.12, 4.8)

41. The second part of SAL's proposed quality program related to assembly of aircraft at Hondo. The proposal states that assembly procedures and documentation from the "approved [SAL] system" would be used by NWASI (proposal 2-96, 97). SAL would provide NWASI with all "build" information, process sheets, assembly, and history documentation, all previously approved by SAL's quality assurance department. Test procedures and documentation relating to completed aircraft would be provided to NWASI by SAL and would be "in accordance with CAA approved requirements" (proposal, 2-97). In addition to the foregoing, the proposal stated that there would be a quality assurance plan, to be written by NWASI, "that will meet all the requirements of MIL-Q-9858A." Finally, assembly of aircraft at Hondo would be conducted "in compliance with FAA regulations" which were not specified. (Proposal at 2-96, 97)

Changes to SAL's Quality Program Required
For Issuance of Production Certificate

42. MIDO required NWASI to submit and obtain approval of a quality control systems procedures (QCSP) manual as a prerequisite for issuance of a production certificate. In a letter dated 8 January 1993, MIDO directed NWASI to include in the manual "all inspection procedures for manufacture of the [SAL] T-3A aircraft" and "inspection procedures/requirements to control the manufacturing and receipt of aircraft from [SAL] in the United Kingdom." MIDO also required that suppliers of materials and components of the aircraft, including SAL, be approved by NWASI. (Ex. A-88) As part of that requirement, vendors and subcontractors, who had been previously approved by SAL under its CAA A1 Primary Company approval, were obliged to re-submit their quality manuals to, and obtain re-certification and re-inspection of quality procedures from, NWASI (tr. 4/351). NWASI was also directed to make arrangements for MIDO to visit KMS, "for the purpose of evaluating [SAL's] production capabilities as a supplier to [NWASI]." (Ex. A-88)

43. The effect of the foregoing was to put SAL into the position of a vendor to its subcontractor NWASI, for quality assurance purposes. (R4, tab 42) As holder of the production certificate, NWASI would be directly accountable and responsible to MIDO for compliance with the quality system instituted at Hondo (tr. 4/351-52). This was contrary to SAL's plan for management of production as set forth in its proposal for the contract, as follows:

> [SAL] enforces a flowdown of technical and contract requirements to [NWASI] . . . . The applicable technical and schedule requirements have been flowed from the [prime] contract with [SAL] to [NWASI]. [SAL] is ultimately responsible to the Air Force but [NWASI] is responsible to [SAL] for successfully meeting these requirements.

(Proposal, at 3-24)

44. In order to obtain the production certificate, the drawing control system, instituted by SAL and approved by CAA, was modified to the extent that NWASI was required by MIDO to maintain a complete master file of drawings and work files at Hondo. However, § 208(a) of AQAP-1 required that "[c]omplete and correct issue drawings, technical requirements, contract change information, work instructions and inspection and test instructions shall be available as applicable at the time and place of manufacture and inspection and test" (ex. Vol. 1A, tab B at 2-4). SAL had represented in the proposal that its quality system met all the requirements of AQAP-1 (finding 37). The record does not indicate the extent to which, if any, that the drawing system modifications or any of the other changes required by MIDO exceeded the requirements of AQAP-1. The configuration control and tracking system required by MIDO as a condition of issuance of the production certificate was also different than that employed by SAL (tr. 7/32).

45. Among the data developed by SAL for manufacture of the aircraft were job cards which contained instructions for individual assembly operations. NWASI was required to expand some of these instructions to meet MIDO concerns that these were not sufficiently detailed for the purposes of a production certificate (tr. 8/284). However, AQAP-1, § 211(a) required that "manufacturing and inspection and test operations [be] carried out under controlled conditions [including] documented work instructions defining the manner of manufacturing or processing, criteria for workmanship" with workmanship to be "defined to the greatest practical extent by written standard" (ex. Vol. 1A, tab B at 2-8).

46. Drawings which had been used by SAL for previous production of the Firefly aircraft needed to be revised in order to respond to MIDO requirements for additional details (tr. 9/78). SAL was also required to prepare special drawing packages, not called for in the Contract Data Requirements List (CDRL), for use in FAA conformity inspections (tr. 5/302).

47. SAL's written claim asserts that "[i]n order to minimize the delaying impact that FAA's manufacturing strictures would have had on the delivery schedule, [SAL] increased effort and issued instructions to . . . [NWASI] to accelerate production to maintain the pre-[C of A's] contract delivery schedule" (R4, tab 3 (hereinafter "claim") at 20). SAL has not produced any evidence of actual acceleration of performance.

48. The claim also asserts, and there was testimony, that the contract performance period was lengthened by six weeks as the result of the additional effort expended, primarily during the first half of 1994, for obtaining the production certificate and the C of A's (R4, tab 3, Annex 4 at 8; tr. 7/29-35). Aircraft deliveries, however, were completed prior to the scheduled completion date in the contract which had been established exclusive of delays associated with those causes (findings 49, 50).

49. The aircraft delivery schedule in the contract was extended pursuant to contract Modification Nos. P00002 and P00008 for reasons not relevant to these claims. The delivery dates were extended, again, in bilateral contract Modification No. P00018, entered into on 31 July 1995. (R4, tab 115) In ¶ 1 of that document, the extensions are attributed simply to the "[m]utual [a]greement of the [p]arties." There is no indication that the extensions were sought by SAL as a matter of right or entitlement. The only evidence as to the basis of the extensions is the contracting officer's testimony that there was a mutual desire for "re[-]establishing the current schedule" (tr. 13/57). The schedule, as adjusted, called for deliveries to be completed by 28 February 1966. The final paragraph of contract Modification No. P00018 was as follows:

> 9. In consideration of the modification agreed to herein as complete and equitable adjustment for the changes stated above, the parties hereby release each other from any and all claims, including but not limited to liability for any extended overhead or unabsorbed home office overhead, inefficiency claims or impact and delay claims under this contract for further equitable adjustments attributable to such facts and/or circumstances giving rise to the aforementioned changes *with the exception of a SAL claim relating to certificate [sic] of airworthiness, identified in SAL's letter of 08 December 1993*. [Emphasis added]

Mr. Cooper, SAL's contracts director, who signed both the letter of 8 December 1993 (finding 13) and contract Modification No. P00018, testified, without contradiction, that the reference to "monetary and [program] implications" in that letter encompassed the effects of the requirement for a production certificate inasmuch as this was "part and parcel of the process of obtaining [C of A's]" (tr. 3/211).

50. The record as to the actual dates of delivery of aircraft is sparse. It discloses only that Aircraft Nos. 1 and 2 were delivered on 3 February 1994 (finding 13). SAL asserts that the last aircraft (No. 113) was delivered on 9 January 1996 (App. Proposed Findings of Fact, 11). The Government has not proposed an alternate date (Gov't br. at 146). On that record, we find that the parties agree that the last aircraft was delivered on 9 January 1996.

Acceptance of Aircraft

51. Each of the contract line items (CLINs) for aircraft, as set forth in Section B of the contract schedule, contained the following:

> Inspection and acceptance at the contractor facility. Acceptance follows successful completion of Production Acceptance Test & Evaluation [PAT&E] and aircraft delivery as evidenced by Government execution of a DD Form 250.

(Contract at 2 of 42)

52. Clause E-067 ACCEPTANCE OF AIRCRAFT of the contract was as follows:

> Acceptance of aircraft shall be in accordance with the specified CLINs and as follows. Each of the Aircraft to be furnished will be finally accepted by the cognizant contract administration office upon successful completion of (i) inspection flight test by the Contractor pilot and a Government pilot; and (ii) acceptance inspection of the aircraft by the cognizant contract administration office. Subsequent to the inspection test flight, the Contractor shall prepare the aircraft for the acceptance inspection. All other supplies and services will be accepted by the Government in accordance with the provisions of the "Inspection and Acceptance – Commercial Items" clause of this contract. Upon Government acceptance, the Contractor shall ensure each aircraft is fully capable for flight, including Petroleum, Oil & Lubricants.

(Contract at 19 of 42)

53. SOW § 3010.a provides, in part, as follows:

> Initial Delivery. No EFS aircraft shall be accepted by the [G]overnment prior to the completion of the following:

. . . .

(5) Production Acceptance Test & Evaluation

(SOW at 2)

54. SOW § 3040.4 is as follows:

> 3040.4 Production Acceptance Test & Evaluation (PAT&E). The contractor shall support PAT&E, which will be performed by the [G]overnment on each aircraft prior to acceptance by the [G]overnment. PAT&E acceptance shall be accomplished in the Continental United States.

(SOW at 5)

55. Section 4.2.1 of the System Specification is as follows:

> ACCEPTANCE TESTING**.** An acceptance test program shall be conducted on all aircraft prior to delivery to the Air Force. Contractor-prepared test procedures shall be subject to approval by the Government. Wherever possible, and when approved by the Government, verification testing shall fulfill the intent of acceptance testing for the first aircraft

(System Specification at 16)

56. On 13 January 1994, SAL submitted Engineering Change Proposal (ECP) 03 to the EFS SPO. ECP-03 provided for modification of the first sentence of § 4.2.1 to state that "[a]n acceptance test program shall be conducted *in accordance with T-3A-ATP-0001* on all aircraft prior to delivery to the Air Force" (emphasis added). ECP-03 was approved by the contracting officer by letter dated 20 January 1994 (ex. A-214).

57. Document T-3A-ATP-0001 is titled "T-3A Firefly Production Acceptance Test and Evaluation Procedures." The cover sheet of the document states that it was "[p]repared for: Aeronautical Systems Center, ASC/YTSE" and "[p]repared by: ASC/YTSE." The edition of T-3A-ATP-0001 dated 2 December 1993 was employed for acceptance of aircraft under the contract (ex. A-195; tr. 13/62-65, 81-82, 232). It contains the following "Introduction:"

> This package contains procedures for the acceptance of the T-3A Firefly aircraft. These procedures begin with the aircraft fully assembled at the NWASI facility at Hondo, TX after all

> Federal Aviation Administration (FAA) conformity inspections and flight testing have been accomplished and the Certificate of Airworthiness has been issued.
>
> No aircraft will be accepted by the Air Force until these inspections have been completed and the aircraft and all equipment to be supplied therewith have been found to be in acceptable condition as specified by the contract . . . and these inspection procedures.

(Ex. A-195 at 1)

58. Document T-3A-ATP-0001 lists the documents required to accompany the aircraft when presented to the Air Force for acceptance. Among these is a "standard airworthiness certificate." (Ex. A-195 at 2, 3)

59. ECP-03 had been submitted by SAL on DD Form 1692 (Engineering Change Proposal) as required by SOW § 3050.2.3 (Configuration Change Control). In the "Title of Change" box of the form, as submitted by SAL and approved by the contracting officer, ECP-03 was described as "[m]inor [t]ext [c]orrections & [a]mendments" with a "nil" amount of "estimated net total costs/savings." (Ex. A-210)

60. The DD Form 1692 submitting ECP-03 was drafted and signed by Mr. Barry Mellers, SAL's chief aircraft designer (ex. A-214; tr. 1/64). Mr. Mellers believed that the modification of § 4.2.1 so as to add a reference to T-3A-ATP-0001 (finding 96) was a minor textual change to the system specification. He believed that, in his capacity as chief aircraft designer, he had authority from SAL to propose and agree to such a change. He did not regard ECP-03 as proposing or instituting a major change to the contract which he recognized was outside the scope of his authority. (Tr. 1/168-71, 180-81)

61. Mr. Mellers was not authorized to agree to, or enter into, contract modifications on behalf of SAL (tr. 3/100). Mr. Will, then serving as EFS SPO contracting officer (tr. 3/103), who approved ECP-03, knew of that limitation on Mr. Mellers' authority. Indeed, in a previous instance, Mr. Will had refused to issue a unilateral contract modification approving another (unrelated) ECP inasmuch as the letter from SAL agreeing to the ECP was signed by Mr. Mellers who was not a "recognized [SAL] signatory" (ex. A-261).

62. The Defense Contract Management Office (DCMAO) at the T-3A assembly facility in Hondo, Texas which administered the acceptance phase of the contract, insisted on presentation of a C of A before signing the DD Form 250 (Material Inspection and Receiving Report) signifying acceptance of an aircraft (tr. 5/224-25).

63. That requirement had also been imparted by USAF to MIDO. In an internal memorandum, dated 16 March 1993, sent to its supervisory FAA office, MIDO's manager, Mr. Daniel, summarized discussions and other events which had transpired concerning the forthcoming production of the Firefly T-3A. The memorandum (ex. A-108 at 2) reports that:

> The Air Force has made it clear to FAA that they will accept these aircraft when produced under a Production Certificate and after a U. S. Standard Airworthiness Certificate has been issued. The Air Force will then conduct an acceptance flight on the aircraft and sign a DOD Form 250 for the acceptance of same. No DOD or Air Force inspector is to be involved in the manufacture of these aircraft.

64. Beginning with Aircraft No. 3, the process actually employed for acceptance of aircraft consisted of the following actions: (1) flight testing of the aircraft; (2) application to FAA for issuance of C of A; (3) inspection of aircraft by FAA for conformity to type design (finding 10); (4) issuance of C of A; (4) inspection of aircraft by DCMAO; (5) acceptance of aircraft by DCMAO, as indicated by signature of DD Form 250 (tr. 5/220-26).

SAL's Monetary Claim

65. On 2 May 1996, SAL submitted a written claim, duly certified pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, seeking an equitable adjustment in contract price in the amount of $5,664,041 (R4, tab 3).

66. SAL alleged in the claim that during the conferences held at KMS during October, 1992, it received a direction from the Air Force to obtain C of A's for the aircraft. SAL requested an equitable adjustment of the contract price under the DFARS 252.211-7002 CHANGES-COMMERCIAL ITEMS (MAY 1991) clause of the contract for the added work and attendant increased costs of complying with that direction on the basis that C of A's were not required by the contract and, accordingly, the direction was a constructive change order. The additional work resulted from changes demanded by MIDO to the quality assurance program which SAL had proposed to implement for the assembly of aircraft by NWASI in the United States.

67. The monetary claim in this appeal seeks added compensation for the following categories of additional work claimed to have been performed in order to qualify for, and obtain, the C of A's: (a) "significant and far reaching changes" to SAL's CAA-approved drawing control system; (b) developing and implementing changes to documentation, configuration control, and quality programs and practices which had been approved by CAA in connection with SAL's designation as an A1 Primary Company (findings 38, 40); (c)

production of additional drawings and data for use by NWASI as holder of the production certificate; and (d) revision and expansion of SAL's approved job cards (finding 45) (R4, tab 3 at 21-23).

68. In a written decision dated 9 January 1997, the contracting officer denied the claim on its merits, in its entirety. The contracting officer asserted that although the Air Force had always intended to obtain C of A's for the aircraft, it had not, at any time, directed SAL to take that action. The contracting officer interpreted the contract as requiring SAL to build the aircraft under a production certificate or a foreign equivalent. The contracting officer asserted that the effort to obtain a production certificate was "driven by [SAL's] choice to assemble and test the aircraft in the [U.S.] . . . rather than the USAF's alleged constructive change in the contract requiring [C of A's]" (R4, tab 11 at 4). There was no mention of the release provisions contained in contract Modification No. P00018. SAL filed a timely appeal from that decision.

DECISION

MIDO required SAL to obtain a production certificate for the assembly operation at Hondo as a condition precedent to issuance of C of A's for aircraft produced at that location (finding 31). In order to qualify for a production certificate, SAL was obliged to change its planned quality program in various respects specified by MIDO (findings 42-46). This appeal is from the denial of SAL's monetary claim for the added costs incurred for the additional work involved in those changes (finding 67).

The contract does not expressly require, or even mention, C of A's. During the programming and post-award conferences, held during October, 1992, USAF representatives made statements which SAL interpreted as being a direction from USAF that SAL obtain C of A's for the aircraft to be delivered under this contract. (Finding 11) The Government denies issuing such a direction, stating that it "fully intended" to apply for C of A's itself, and, accordingly, did not include a contract requirement for SAL to obtain them (Gov't br. at 123).

The question of whether SAL was directed, in October, 1992, to obtain C of A's for the aircraft is mooted by the subsequent promulgation of ECP-03 requiring that C of A's be tendered at the time of presentation of aircraft for acceptance (findings 56, 57, 58). This was not required by the existing provisions of the contract relating to acceptance of aircraft (findings 51-55). The establishment of that additional acceptance condition was a constructive change to the contract entitling SAL to equitable adjustment of the contract price for any resulting added costs of contract performance. *Hallicrafters Co*., ASBCA No. 7097, 68-1 BCA ¶ 6950 at 32,155.

There is no indication that in submitting ECP-03 on 13 January 1994 (finding 56), SAL intended to forego the claim for additional compensation for obtaining the C of A's,

notice of which had been given in its letter to the contracting officer of 8 December 1993 (finding 13). A FAX of that letter addressed to the contracting officer arrived at the EFS SPO on the same day but was misdirected within that office and not promptly delivered to the contracting officer (finding 14). It would be unfair for SAL to be prejudiced by such mishandling of the letter. In such circumstances, it is proper to hold that even if the contracting officer did not actually know of the contents of that letter on 8 December 1993, he ought to have had such knowledge and the same is imputed to him as of that date. *Gresham & Co., Inc. v. United States*, 470 F.2d 542, 556 (Ct. Cl. 1972). Accordingly, he must be deemed to have approved ECP-03 subject to a reservation of SAL's claim for additional compensation relating to obtaining the C of A's. Another indication that said claim survived the proposal and approval of ECP-03 is the subsequent express exception of that claim from the release contained in contract Modification No. P00018, dated 31 July 1995 (finding 49).

The added costs claimed by SAL would not be recoverable if SAL was obligated under the contract to obtain a production certificate, as the Government contends. The first asserted basis for such an obligation is the statement made at the pre-BAFO discussions by Mr. Pollock, an executive of SAL's parent company, that a production certificate would be obtained. That undertaking amounted to a modification of SAL's proposal which did not provide for, or include the costs of, obtaining a production certificate. (Finding 23)

The modification, however, was not included in SAL's BAFO (finding 29). SAL was entitled to withdraw the same in submitting the BAFO. *Marylou's Transportation Service*, Comp. Gen. No. B-261695, 95-2 CPD ¶ 154. The omission of the modification served as a withdrawal with the consequence that no obligation for a production certificate could have been created upon acceptance of the BAFO and award of the contract. The Government also points to the purported agreement with SAL, at the pre-BAFO discussions, that a production certificate was required by System Specification § 3.2.3.2. The record does not support the alternate assertion that the parties agreed at the pre-BAFO discussions that the production certificate was required by System Specification § 3.2.3.2 (Gov't br. at 195) (findings 24, 25).

Considered in isolation, the term "FAA . . . type and production certification" used in § 3.2.3.2 (finding 26) might be viewed as referring to an FAA production certificate. However, the rules of contract interpretation require that we read these words in the context of surrounding relevant provisions. *Lockheed Martin Tactical Defense Systems, Akron*, ASBCA No. 50302, 98-2 BCA ¶ 30,079. Section 3.2.3.2, titled "Airframe," is part of § 3.2.3 titled "Physical Characteristics." Section 3.2.3.2 is preceded, and followed, by provisions relating to components, dimensions, and performance requirements of the aircraft (finding 27). The FAA production certificate, however, relates to the subject of quality control in the production of aircraft (findings 20, 21). That difference of subject-matter makes it unreasonable to interpret § 3.2.3.2 as requiring an FAA production certificate.

An alternate, reasonable, interpretation of § 3.2.3.2 is that the term "FAA . . . type and production certification" refers to the FAA Conformity Certificate - Military Aircraft (FAA Form 8130-2) which is required to be provided by SAL prior to the delivery and acceptance by the Air Force of each aircraft. A signed FAA Form 8130-2 certifies that the aircraft described therein has been manufactured in conformity with data forming the basis for the related type certificate. (Finding 10)

System Specification § 3.2.3.2 was drafted by the Government (finding 27). SAL relied, in bidding, on the interpretation that the contract did not require a production certificate (finding 23). In these circumstances, the above alternate, reasonable, interpretation favoring SAL would prevail under the rule of *contra proferentem* even it were reasonable to interpret § 3.2.3.2 as requiring a production certificate. *Neal & Co., Inc. v. United States*, 945 F.2d 385, 389-90 (Fed. Cir. 1991).

Although SAL was not required by the contract to obtain a production certificate for the Hondo operation, it had an obligation under SOW § 3050.2.4, to "maintain a quality program which meets or exceeds the requirements of [FAvR] Part 21 (or foreign equivalent)" (finding 35). SAL contends that the quality program accepted by CAA in granting A1 Primary Company approval qualified as a "foreign equivalent" under SOW § 3050.2.4. On that basis, it contends that the changes to that program required by MIDO in connection with issuance of a production certificate exceeded the requirements of the contract and are additionally compensable.

The standards for a quality program under FAvR Part 21 in relation to production certificates are set forth in Subpart G (FAvR 21.131 - 21.165). Under FAvR 21.135, an applicant is entitled to a production certificate if the FAA finds that the applicant has complied with FAvR 21.139 and 21.143. FAvR 21.139 requires the applicant to "show that [it] has established and can maintain a quality control system" for the product "so that each article will meet the design provisions of the pertinent type certificate" (finding 20). FAvR 21.143 provides for submission and approval of inspection and test procedures "necessary to ensure that each article produced conforms to the type design and is in a condition for safe operation" (finding 21).

FAA, acting through MIDO, had the authority and responsibility for implementing FAvR Part 21 in relation to issuance of production certificates (finding 31). There is no contention that any of the measures directed by MIDO in order for NWASI to qualify for a production certificate were impermissible under, or inconsistent with, the Subpart G regulations. Accordingly, the quality program proposed by SAL with the modifications required by MIDO for issuance of the production certificate, can fairly be regarded as a "quality program which meets or exceeds the requirements of [FAvR] Part 21" under SOW § 3050.2.4.

Under SOW § 3050.2.4, however, SAL had the election of maintaining a quality program which was a "foreign equivalent" of an FAvR Part 21 quality program. The contract does not define "equivalent." In the absence of that definition, we are permitted to resort to the ordinary, normal meaning of that term, as set forth in a recognized dictionary. *The Master Builders*, ASBCA No. 26129, 82-2 BCA ¶ 15,842 at 78,540; *Catel, Inc.*, ASBCA No. 52224, 02-1 BCA ¶ 31,731 at 156,763. The primary definition accorded to "equivalent" in BLACK'S LAW DICTIONARY 561 (7th ed. 1999) is "equal in value, force, amount, effect or significance."

The quality program set forth in SAL's company exposition formed the core of the program to be used in the assembly of aircraft at Hondo. That document had been the basis of CAA's approval of SAL as an A-1 Primary Company and, as a consequence, the authorization of SAL to perform "design, manufacture, overhaul modification, and repair" of listed aircraft including "[a]ll variants of T67 aircraft" in the U.K. (Findings 38, 39) C of A's issued by CAA for aircraft produced under that authorization would have qualified for issuance of FAA C of A's (finding 31, n. 2) SAL intended to supplement its CAA-approved quality program with a quality assurance plan, to be written by NWASI, "that will meet all the requirements of MIL-Q-9858A." Finally, assembly of aircraft at Hondo would be conducted "in compliance with FAA regulations." (Finding 41) Composed of those elements, we hold that the quality program which SAL proposed and intended to apply to production of aircraft and components at KMS and Hondo qualified under SOW § 3050.2.4 as the foreign equivalent of an FAvR Part 21 quality program.

SAL was prevented from implementing its election of a foreign equivalent program and compelled to modify that program in order to obtain a production certificate. It is entitled to recover the added costs of those modifications.

SAL sought to recover the added costs resulting from the alleged six weeks lengthening of the contract performance period as the result of the additional effort expended for obtaining the production certificate and the C of A's (finding 48). It is not enough to show that actions of the Government slowed the performance of the contract. It is necessary for SAL to show, also, that these actions delayed the completion of the contract as a whole. *Structural Finishing, Inc.*, ASBCA No. 30260, 85-3 BCA ¶ 18,235. This did not occur here.

SAL completed the contract on 9 January 1996 upon delivery of the last aircraft (finding 50). That was earlier than the date of 28 February 1996 set in contract Modification No. P00018 for completion of aircraft deliveries and, thus, completion of the contract (finding 49). Delay effects of the requirements for C of A's and a production certificate would not have been taken into account in arriving at the 28 February 1996 completion date. Claims for these effects had been excepted and excluded from the scope of the schedule adjustments made in contract Modification No. P00018 (finding 49). In the light of that exclusion, completion of aircraft deliveries prior to 28 February 1996 signifies

that the requirements for C of A's and a production certificate could not have delayed the completion of the contract as a whole. On that basis, the claim for added costs of delay is denied.

The Government also defends against the claim on the ground that SAL took the actions necessary for obtaining a production certificate "without allegation, notice, or complaint to the Air Force that such effort was not a contract requirement" and without informing the contracting officer that "there would be associated costs for obtaining" a production certificate (Gov't br. at 103-05). It is asserted that such notice or complaint was first given in the claim submitted in May, 1996. The Government alleges that notice was untimely given and was prejudicial in that the Government was "deprived . . . of the opportunity to evaluate the alleged constructive change . . . and . . . take action to minimize any alleged additional costs" (Gov't br. at 111).

These matters were raised for the first time in the Government's post-hearing briefs. They were not asserted after claim submission nor were they set forth in the contracting officer's written decision relating thereto or the Government's answer. The decision proceeded directly to the merits of the claims and denied them solely on that basis. The disposition of the claims on the merits served as a waiver of any defenses of the Government based on failure of SAL to protest alleged constructive changes and timely assert related claims as well as barring claims of prejudice to the Government ensuing from the foregoing. *Dittmore-Freimuth Corp. v. United States*, 390 F.2d 664, 668 (Ct. Cl. 1968); *Hangar One, Inc.*, ASBCA Nos. 19460, 19461, 76-1 BCA ¶ 11,830 at 56,508-09.

The Government contends, also, that SAL's claim for added costs incurred for obtaining a production certificate is barred because it was not reserved for future assertion in bilateral contract modifications entered into between the parties. In particular, the Government points to contract Modification No. P00018 expressly reserving only "SAL claim relating to certificate [sic] of airworthiness, identified in SAL's letter of 08 December 1993" (finding 49). On that basis, the Government contends that SAL "has waived its right to file a claim against the Air Force relative to obtaining an FAA Production Certificate and any associated delay and disruption" (Gov't. br. at 135). There was undisputed testimony at the hearing, supported by MIDO's requirement (finding 31), that obtaining the production certificate was "part and parcel of the process of obtaining [C of A's]" (finding 49). This supports SAL's position (app. reply br. at 50) that the costs of obtaining the production certificate were part of the stated exception to the release in contract Modification No. P00018. The contracting officer manifested agreement with that position in his decision by denying recovery for added costs of the production certificate on the merits without any mention of the release (finding 68). The consideration of the merits after the agreement to that release "indicated an understanding [by the contracting officer] that the release did not constitute abandonment of the claim." *C & W Electric Co*., ASBCA No. 34236, 88-2 BCA ¶ 20,624 at 104,245.

The Government's Motion for Summary Judgment

Approximately one month after the close of the hearing on the merits, the Government, for the first time, moved for summary judgment denying the appeal. The motion has been mooted by the hearing on the merits and accordingly, is dismissed.

CONCLUSION

The claims for delay and acceleration (findings 47-50) are denied. In all other respects, the appeal is sustained to the extent indicated above and is referred back to the parties for negotiation of the amount due SAL plus interest pursuant to § 611 of the CDA from the date of receipt of SAL's claim dated 2 May 1996 (finding 65).

Dated: 25 April 2003

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50473, Appeal of Slingsby Aviation Limited, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals